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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 434

JULIUS GENDELMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Distrit Court rendered no opinion. The opinion of the Court of Appeals (R. 706-712) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 1951. (R. 713.) The petition for a writ of certiorari was filed on November 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Was the evidence sufficient to sustain the verdict?

2. Was it error to admit evidence of petitioner's net worth?

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on March 8, 1950, in the United States District Court for the Southern Dis-

trict of California on two counts. (R. 3-5.) Count one charged that petitioner wilfully attempted to defeat and evade his individual income and victory taxes for 1943 by filing a false and fraudulent return wherein he stated that his net income, computed on the community property basis, was $2,593.38, and that the income and victory tax thereon was $401.25; whereas his income for the year 1943, computed on the community property basis, was $10,839.90 and the tax due was $2,913.85. (R. 3-4.)

Count two charged that petitioner wilfully attempted to evade and defeat a large part of the income and victory taxes of his wife, Edythe Gendelman, for the year 1943 by causing to be filed on her behalf a false and fraudulent return in which it was stated that her net income for the year, computed on the community property basis, was $2,593.37, and the tax due thereon was $398.87; whereas, her net income for the year, computed on a community property basis, was $10,839.90, and the tax due was $2,913.85. (R. 4-5.)

A motion for acquittal was made at the conclusion of the Government's case (R. 652, 660) and was denied (R. 654, 661). The motion was renewed at the close of the defense and again denied. (R. 673.) After denying the motion for acquittal and for a new trial (R. 14-15) the court sentenced the petitioner to imprisonment for a term of ten months on each count, to run concurrently (R. 15-17).

Petitioner was engaged in the manufacture and sale of furniture during the year 1943, the two principal businesses operated by him during the year being the Modern Furniture and Upholstering Company, Inc., a corporation, and Super-Built Furniture Manufacturing Company, a sole proprietorship, which succeeded the former company on June 30, 1943. (R. 340-341, 388.) Both concerns were engaged in manufacturing furniture, and in order to provide sales outlets for their products, petitioner purchased or opened retail stores which he operated for various periods of time. (R. 410-411.)

Petitioner and his wife were the actual owners of the entire interest in the Modern Furniture and Upholstering Company, Inc., during the period of its existence. (R. 336-340, 362-365, 403-404, 408; Ex. 34, 46B, 47.) This company was consolidated with Super-Built Furniture Manufacturing Company on June 30, 1943 (R. 340-341, 388), the legal title being placed in the name of Esther Chochem (R. 390), although petitioner was actually the owner (R. 404, Ex. 34). The net income of the company of $9,286.75 was reflected on the income tax return of Esther Chochem for 1943. In answer to a request by the Government for information as to the true ownership of his enterprises in the name of Esther Chochem, petitioner made the following signed statement: "Esther Chochem was the owner of the legal title to the property of the

business operated under the name of Super-Built Furniture Mfg. Co., but the income therefrom was received by Julius Gendelman, to whom it really belonged". (R. 709, Ex. 44.) The income from Super-Built was not reported on petitioner's 1943 return.

Petitioner also owned Modern Furniture Company, a retail store, until April, 1943 (R. 397-399) when it was sold to Standard Furniture Company. Its operations were reflected on the books of Modern Furniture and Upholstering Company, Inc., and when this retail outlet was sold, a part of the consideration was made payable to Lloyds Furniture Company. (R. 501-504.)

Manufacturers Furniture Outlet, a retail store, was owned and operated by petitioner until March 2, 1943 (R. 408, 415, 438, Ex. 34) when it was sold to Louis Mandell (R. 107-110).

L. A. Mode Furniture Manufacturing Company, a furniture manufacturing company, was in existence from February 22, 1943 to June 30, 1943, when it was sold to Super-Built Furniture Manufacturing Company. (R. 408, 388-389, Ex. 34.) Title to this business was in the name of Mrs. Gendelman (R. 389), and a loss of $1,281.22 shown on the company records was claimed by petitioner and his wife on their income tax returns (Ex. 2, 3).

Lloyds Furniture Company, a retail outlet, was operated from on or about January 22, to May 26, 1943. (R. 408, 436, 438, Ex. 34.) Title to the busi-

ness was in the name of Esther Chochem, both in the purchase and sale of the business, but the petitioner was the owner. (R. 408, 493.)

J and S Sales Company, a wholesale outlet, was operated in August and September, 1943, as a partnership between petitioner and Joseph J. Sherline. (R. 198-199, 396.) The petitioner furnished materials for assembly of living room suites, and Sherline sold the merchandise. (R. 199-200.)

Allied Furniture Company, a retail store, was owned and operated by petitioner until December, 1943. (R. 78, 397.)

During 1943 petitioner had no personal bank accounts in his own name. (R. 621-622.) He utilized three commercial and two savings bank accounts of Edythe Gendelman, his wife, in three separate banks. (R. 46-48, 58-62, Ex. 9-14, 20-22.) He held a power of attorney over a commercial account in the name of his aunt, Esther Chochem (R. 64, 66, 68, Ex. 23), and he also used another commercial account and two savings accounts in the name of Esther Chochem (R. 49, 51, 436, 443-447, Ex. 15-17). He held a power of attorney on a commercial account in the name of Corrine Chochem, daughter of Esther Chochem. (R. 52, 436, Ex. 18.) In addition, he held a power of attorney over a commercial account in the name of Lloyds Furniture Company, title to which business was in the name of Esther Chochem. (R. 70-71, 437-438, Ex. 24.)

Bank deposits made to the various Chochem accounts were traced as emanating from the sales of

merchandise by the manufacturing and retail concerns owned by petitioner, and from the sales of the retail stores themselves. These deposits were identified as (1) sale of merchandise amounting to $1,844.00 (R. 545-546) paid by State Investment Company checks (Ex. 5); (2) sale of Manufactures Furniture Outlet retail store to Louis Mandel for $7,600 (R. 541-542, Ex. 29); (3) sale of $1,080 merchandise to Orn's Furniture Company (R. 113-114, 121, 415-417; Ex. 30); (4) sale of merchandise to J & S Sales Company of $3,981.64 (Ex. 32A-32H); (5) sale of merchandise by J & S Sales Company of $1,704 (R. 128-129, 449). Deposits of $1,080 and $3,121.45 to Lloyds Furniture Company account were identified as a sale of merchandise to Orn's Furniture Company (R. 115-124), and sale of the retail store, Modern Furniture Company (R. 32, 36, 504, Ex. 1). These deposits were listed in petitioner's books as loans payable, and were later transferred from the loans payable to the capital account. (R. 393, 549, 552, 561.)

In addition to the bank deposits, the petitioner had available undeposited funds which were used to pay off loans of $4,424.45 and $744 (R. 463-464); to invest in automobiles and trucks in the amount of $3,485 (R. 465, 510, 511) and to pay into various escrow accounts (R. 466, 467, 525-527). None of the foregoing amounts were reflected on his books or income tax returns, and when his accountant made out income tax returns for 1943 the peti-

tioner stated that he did not have any other income. (R. 160-161.)

From analysis of the bank accounts utilized by petitioner and undeposited funds available to him which were not reflected on his books or income tax returns, the revenue agent computed additional unreported net community income of $22,506.16. (R. 475.) To corroborate the results of the bank deposit analysis, the revenue agent made a net worth analysis which showed that, based on the evidence and records, petitioner's net worth on January 1, 1943 was $15,031.67 and at the end of 1943 it was $48,130.94, or an increase in net assets of $33,099.27. (R. 604-607.)

ARGUMENT

Petitioner contends that the evidence was insufficient to support the verdict and that the trial court erred in not granting his motion for a judgment of acquittal.

A summary review of the evidence shows that none of petitioner's numerous business enterprises were carried on in his own name, and that none of the numerous bank accounts over which he exercised control were in his own name. In a signed statement he admitted that Super-Built Furniture Manufacturing Company belonged to him, yet the income from this source was not reported by him. Bank deposits which were listed in his books as loans payable were actually proved to have been income from the sale of merchandise, and were shown to have been later transferred from the

loans payable account to the drawing account. Based on these bank deposits, the unreported income was computed at $22,506.16 as compared with $5,186.75 total reported by both petitioner and his wife.

In corroboration of the computation of income by the analysis of bank deposits, the Government introduced a net worth summary which compared petitioner's financial position as of January 1, 1943, with his position as of December 31, 1943. The minimum amount of unreported income thus determined was $19,627.64.

There was evidence not only that there was an understatement of income but that petitioner's conduct was wilful, as shown by the concealment of his assets in placing them in the names of others, in making false entries on his books, and in handling his affairs in such manner that usual records were not made. *Spies* v. *United States,* 317 U.S. 492, 499.

The only defense offered was introduced through cross examination of Government witnesses, that certain items were not properly included in the estimate of petitioner's income; that certain questionable accounting entries resulted from mistakes of employees; and that admissions made in his signed statement were not in fact true. Disputed issues of fact were thus presented, and as pointed out by the court below (R. 710-711), neither the petitioner's admissions nor the bank deposits stood

alone as the sole proof of tax due and deliberately omitted from his return. As the court said (R. 711):

> The evidence of the assets held by appellant in others' names, the large amount of funds at his disposal and without explanation as to source, the questionable bookkeeping entries, the increase in his net worth during the year, all considered in light of the taxpayer's own admissions, was in our opinion sufficient evidence to justify submission of the case to the jury. *United States* v. *Johnson, supra,* [319 U.S. 503] at page 518.

Because the petitioner kept no records for some of his business activities, or if he kept them, failed to make all of his records available (R. 370-372) and because other books were incomplete or erroneous (R. 327-329, 418, 465-468) the revenue agent was compelled to compute petitioner's income by analysis of bank accounts. Petitioner contends that this was insufficient to take the case to a jury. **(Pet. 12.)**

The rule in such cases, as stated in *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U.S. 709, is that the Government's proof must establish the existence of a business of a lucrative nature, periodic deposits in bank accounts over which the taxpayer exercises dominion and control, and that the income was current. The

proof in this case clearly satisfies these tests. The use of bank deposits to compute income has been approved in a long line of cases, including: *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U.S. 957; *United States* v. *Venuto,* 182 F. 2d 519 (C.A. 3d); *Jelaza* v. *United States,* 179 F. 2d 202 (C.A. 4th); *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th), certiorari denied, 336 U.S. 912; *Buttermore* v. *United States,* 180 F. 2d 853 (C.A. 6th); *Capone* v. *United States,* 51 F. 2d 609 (C.A. 7th), certiorari denied, 284 U.S. 669; *Chadick* v. *United States,* 77 F. 2d 961 (C.A. 3d); *Guzik* v. *United States,* 54 F. 2d 618 (C.A. 7th), certiorari denied, 285 U.S. 545; *Malone* v. *United States,* 94 F. 2d 281 (C.A. 7th), certiorari denied, 304 U.S. 562; *Oliver* v. *United States,* 54 F. 2d 48 (C.A. 7th), certiorari denied, 285 U.S. 543; *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7th); *Orzechowski* v. *United States,* 37 F. 2d 713 (C.A. 3d); *Singer* v. *United States,* 58 F. 2d 74 (C.A. 3d); *United States* v. *Miro,* 60 F. 2d 58 (C.A. 2d); *United States* v. *Zimmerman,* 108 F. 2d 370 (C.A. 7th); *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th).

The case of *Kirsch* v. *United States,* 174 F. 2d 595 (C.A. 8th), upon which petitioner relies, is clearly distinguishable because the Government's own testimony in that case showed that the deposits could not be identified as income, whereas in the instant case numerous deposits were traced directly

from sales made by petitioner. (R. 106-121, 415-417, 541-549, Ex. 1, 5, 29, 30, 31, 32.) The other cases cited by petitioner did not involve the use of current bank deposits as a means of determining income. (See *infra* pp. 12-13.)

Petitioner also contends that it was an error to permit the revenue agent to testify as to his net worth increase during the year 1943. The witness was qualified as an expert witness (R. 325-326); and his analysis of the petitioner's increase in net worth was based upon the evidence and testimony previously introduced (R. 602). The use of the increase in net worth method to compute income in the absence of adequate records has been approved in numerous cases, including *United States* v. *Johnson,* 319 U.S. 503, rehearing denied, 320 U.S. 808; *United States* v. *Skidmore,* 123 F. 2d 604 (C.A. 7th), certiorari denied, 315 U.S. 800; *United States* v. *Chapman,* 168 F. 2d 997 (C.A. 7th), certiorari denied, 335 U.S. 853; *Barcott* v. *United States,* 169 F. 2d 929 (C.A. 9th), certiorari denied, 336 U. S. 912; *Schuermann* v. *United States,* 174 F. 2d 397 (C.A. 8th), certiorari denied, 338 U.S. 831. The use of net worth analysis to corroborate other evidence of increased income has also been approved in *Leeby* v. *United States* (C.A. 8th), decided November 13, 1951 (1951 C.C.H., par. 9497); *Gariepy* v. *United States,* 189 F. 2d 459 (C.A. 6th); *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th).

The cases of *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5th), affirmed, 338 U.S. 552, and *United*

States v. *Fenwick*, 177 F. 2d 488 (C.A. 7th) are clearly distinguishable. In neither case was there direct proof of unreported income, as was established here. Both cases relied exclusively upon the agents' computations of net worth, whereas in the instant case it was merely corroborative of evidence established by other means. Finally, in the *Bryan* case, the revenue agent frankly admitted that he did not know whether his computations contained all the assets of the defendant or not.

CONCLUSION

The decision of the court below is plainly correct and presents no conflicts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1951.

☆ U.S. GOVERNMENT PRINTING OFFICE 1951—979821/PO 537